(1)
Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

SODEXHO MARRIOT SERVICES, INC.,

Petitioner,

v.

CYNTHIA CARTER McREYNOLDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A decision to certify a putative class often constitutes the single most significant event in deciding the outcome of a class action lawsuit, as commentators and many in Congress have recognized. Fed. R. Civ. P. 23(f) was promulgated in 1998 so that significant class certification decisions could be appealed and reviewed before trial to ensure uniformity of decisions and prevent significant errors.

In this massive employment discrimination case, the district court certified a nationwide class of managerial and executive level employees despite, as the court admitted, the lack of a direct precedent and without providing the defendant an opportunity to rebut plaintiffs' statistical evidence and anecdotal claims. The D.C. Circuit denied defendant's petition for interlocutory appeal, applying a standard that limits Rule 23(f) appeals to rare cases.

This petition therefore raises a critical question regarding class action procedure that has sharply divided the circuits:

> Do the circuit courts of appeal have discretion to limit their grant of interlocutory appeals under Fed. R. Civ. P. 23(f) to those rare class certification decisions that present (i) manifest error by the district court, (ii) an unsettled fundamental issue of law that is likely to evade end-of-the-case review, or (iii) a "death knell" impact terminating the case?

PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Sodexho Marriott Services, Inc., now Sodexho, Inc. ("Sodexho"), is the defendant in the district court proceedings below. Respondents Cynthia Carter McReynolds, et al. are current and former management-level employees of Sodexho and its two predecessor corporate entities, Marriott Management Services ("MMS"), a former division of Marriott International, Inc., and Sodexho U.S.A. ("SUSA"), a former division of Alliance Sodexho, S.A. Ten named plaintiffs brought this action: Ms. McReynolds, Lisa Mitchell, Robert Morris, Jr., Chip Moss, Marilyn McNish, Ezzie L. Henry, Dwain P. Richardson, Tarsha Ann Hardy, Gail L. Darlington, and Samuel Cokes. Their motion for class certification sought certification of a class of all African American salaried employees of Sodexho, MMS, and SUSA at any time from March 9, 1998 to December 7, 2001 who have held or sought managerial level positions.

Pursuant to Rule 29.6, Sodexho certifies that it is a wholly owned subsidiary of Sodexho Alliance, S.A., a publicly held company. No other publicly held company holds 10% or more of its stock. Sodexho may have indemnity coverage for at least some of the claims and potential damages sought by plaintiffs through an EPLI insurance policy with the Federal Insurance Company, a subsidiary of The Chubb Corporation, which is publicly traded. No other publicly traded company is financially interested in the outcome of the proceeding.

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Sodexho respectfully petitions for a writ of certiorari to review a decision by the United States Court of Appeals for the D.C. Circuit denying Sodexho's Fed. R. Civ. P. 23(f) petition to appeal an order of the United States District Court for the District of Columbia certifying a class for liability purposes.

OPINIONS BELOW

The ruling of the Court of Appeals denying Sodexho's Rule 23(f) petition is unreported and is reprinted at Appendix A (App. 1a-2a). The memorandum opinion of the district court granting plaintiffs' motion for class certification is reported at 208 F.R.D. 428 (D.D.C. 2002) and is reprinted at Appendix B (App. 3a-52a). The order of the district court certifying the class is unreported and is reprinted at Appendix B (App. 53a-54a).

STATEMENT OF JURISDICTION

The Court of Appeals denied Sodexho's Rule 23(f) petition on February 25, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1). Plaintiffs asserted original jurisdiction in the district court pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

RULE INVOLVED

Rule 23 of the Federal Rules of Civil Procedure is printed at Appendix C (App. 55a-59a).

STATEMENT OF THE CASE

In *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982), this Court held that district courts must conduct a "rigorous" analysis of claims for class certification under Rule 23. In applying *Falcon* in this case, the district court did not allow Sodexho to challenge or rebut plaintiffs' evidence, reflecting one side of a wide gulf among the lower courts as to whether, and to what extent, *Falcon* requires deferential judicial review of class allegations. Pursuant to Rule 23(f), Sodexho petitioned the D.C. Circuit to consider that and other important and unsettled issues of law concerning the use of class actions in employment discrimination cases. The D.C. Circuit declined to hear the appeal, applying a standard under which that court and the Second Circuit "rarely" grant Rule 23(f) appeals.

The case involves the certification of a nationwide class of 2,600 current and former African American managerial employees – including top-level management – in an employment discrimination action against the largest food and facilities management corporation in the United States. Ten named plaintiffs claim that decentralized and subjective promotion practices at more than 5,000 job sites in 47 states discriminate against African American managers. This case apparently is one of the largest employment discrimination class actions regarding promotions of managerial-level employees ever brought against a private employer.

Sodexho was formed on March 28, 1998 through a merger of MMS, a division of Marriott International, Inc., and SUSA, a division of Sodexho Alliance, S.A., into Sodexho Marriott Services, Inc., a publicly-traded company listed on the New York Stock Exchange. Due to this merger's

size and complexity, the MMS and SUSA sides of Sodexho did not integrate payroll and accounting systems, salary grades and personnel policies until early 2000.

Sodexho is a massive company with six autonomous divisions, each itself the size of a significant corporation. As of November 2001, it employed over 110,000 individuals. App. 4a, 208 F.R.D. at 431. The company is largely decentralized. Its six distinct divisions function like wholly-owned subsidiaries, each with its own unique culture and identity. Each division keeps its own accounting records, issues its own internal financial reports, maintains its own human resources department, and, except at the highest levels of executive management, makes its own independent promotion decisions. Within these six divisions, there is a total of approximately **155 separate geographic regions** dispersed nationwide that have significant autonomy in personnel decisions, including the selection of mid-level managers. The regions service **5,000** local accounts, spread over an even greater number of sites.

The scope of the proposed class action is therefore staggering. Plaintiffs challenge promotion decisions made by literally thousands of decision-makers (there were **5,436** local General Managers and **486** regional District Managers during the class limitations period) unconnected by any allegedly discriminatory policy or common purpose other than their substantial autonomy in decision-making and their alleged use of subjective criteria.

The ten named plaintiffs brought this action on March 9, 2001, claiming that Sodexho's promotion policies violated Title VII and related civil rights statutes under disparate impact and treatment theories. They complained that they

are segregated into certain units, denied promotion opportunities to higher-level management positions, underrepresented at higher pay band levels, harassed, and discriminated against in training, discipline, compensation, termination, and performance reviews. Their complaint sought equitable remedies, back pay, front pay, compensatory damages, and punitive damages for the class, which, given plaintiffs' avowed intention to seek the maximum $300,000 compensatory and punitive damages award permitted by Title VII, would total close to ***$1 billion*** in damages ***plus*** back and front pay.[1]

After a period of class-related discovery, plaintiffs moved for class certification in December 2001. Their motion rested upon the named plaintiffs' limited anecdotal accounts of alleged instances of discrimination, corroborating evidence by several putative class members and a single white supervisor, an industrial expert's critique of Sodexho's promotion practices, and a statistical analysis by another expert, Dr. Bernard Siskin. Based upon a statistical analysis of 10,000 promotion decisions concerning Sodexho's managerial positions during a five-year span (1995-2001) rather than the three-year limitations period (March 1998-2001), Dr. Siskin found a shortfall of approximately 250 promotions for African Americans. He ignored numerous factors that could account for promotion decisions for managerial-level employees, *e.g.*, prior experience, education, or part-time status. The report also failed to assess whether the shortfall was national in scope or was limited to particular divisions, regions, or local operating units.

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1. At deposition, certain named plaintiffs reaffirmed their intent to pursue maximum damages, but, in the proceedings below, plaintiffs tried to distance themselves from that testimony. They offered no evidence that their claims were lower, however, nor did they provide an estimate of their actual demand.

In response, Sodexho proffered extensive evidence of its aggressive pursuit of affirmative action and improved internal promotion policies since the merger. Its Senior Vice President of Human Resources is African American, as was his predecessor. Based in part on his initiatives, which plaintiffs castigate as discriminatory, African American representation in the company stands at 12.2%, well in excess of labor force availability, and has improved since the merger. Sodexho's employment practices have been reviewed numerous times by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") and have repeatedly received a clean bill of health. The OFCCP recently conducted a comprehensive review of Sodexho's headquarters division, assessing many of the same promotional results attacked by plaintiffs, and found ***no*** evidence of discrimination.

Sodexho also proffered expert evidence from Dr. Joan Haworth, who serves as the *district court's* neutral expert in massive *Amtrak* class action litigation pending in the same court. She demonstrated that, even under Dr. Siskin's flawed methodology, his own back-up data (which he conspicuously failed to analyze in his report) found ***no statistically significant adverse promotion results in four of Sodexho's six divisions***. Indeed, only ***9 of Sodexho's approximately 155 regions*** – a mere 6% – had statistically significant adverse results. In other words, plaintiffs' own evidence demonstrated that any alleged problems were localized.

In addition to pointing out the exculpatory impact of Dr. Siskin's unreported data, Dr. Haworth applied a much more accurate regression analysis. Unlike what Dr. Siskin indicated in his report, Dr. Haworth accounted for division, geography, and other factors. That more refined analysis

showed that only ***2 to 3 of those approximately 155*** regions had statistically significant negative results for African Americans.[2]

Dr. Haworth also demonstrated, and plaintiffs did not dispute, that the representation of African American class members in most divisions ***exceeded*** their labor market availability. Indeed, at high-level pay bands, where discrimination supposedly was the most rife, African American representation at ***all*** of Sodexho's divisions was consistent with availability.

Finally, Dr. Haworth assessed whether use of Sodexho's systems for posting job vacancies (a focus of plaintiffs' case) had discriminatory impact, and she found none.

None of this objective evidence was considered by the district court, which cited decisions emanating from *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), as requiring it to accept as true all facts alleged by plaintiffs and to ignore Sodexho's evidence to the contrary. *See* App. 4a-5a, 208 F.R.D. at 431 (stating that "the Court will assume the facts as set forth by plaintiffs"). That unquestioning acceptance of plaintiffs' facts led the district court to critical errors.

For example, the court treated Sodexho as if it were a monolithic, static entity notwithstanding decentralization and

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2. ***None*** of the named plaintiffs worked in regions that either expert had found to have statistically significant adverse results. Many worked in a region with significantly ***favorable*** promotion results: 29% of the promotions in that region went to African Americans. Ironically – and tellingly – that is the same region in which most of the anecdotal instances of discrimination cited by plaintiffs supposedly occurred.

the merger of two unrelated corporations at the outset of the limitations period. It concluded that Sodexho's system for posting vacancies and making promotion decisions is the same as that MMS used in 1994, even though that system was replaced in 2000 (and was never used by SUSA).[3] And it ignored clear evidence of intra-class conflicts arising from the fact that the named plaintiffs and other class members are themselves members of the very management structure that they allege has discriminated against them – a clear ground for rejecting the class under settled D.C. Circuit precedent.[4]

The district court's treatment of the statistical evidence was equally one-sided. Applying Second Circuit precedent,

3. Three years ago, well within the class limitations period, Sodexho closed its system for posting job vacancies that it had inherited from Marriott in favor of a new "Career Center" posting system that imposes mandatory written procedures, including written job descriptions with objective criteria for selection (such as experience and education), review of all job postings by human resources personnel, and disciplinary action for non-compliance. The district court never considered the newer system. *See* App. 8a-9a, 33a & n.18, 208 F.R.D. at 432-33, 441 & n.18.

4. Even though named plaintiffs testified to specific and discrete adverse decisions made by other class members, including denials of promotions, the court summarily dismissed these conflicts as abstract and unproven. *See* App. 47a-48a, 208 F.R.D. at 447. Their testimony was not, however, ambiguous or confusing. For instance, named plaintiffs McReynolds and Moss each passed over named plaintiff McNish for promotions in decisions that McNish alleges are discriminatory. Named plaintiffs Morris and McNish each alleged instances in which putative class members denied them promotions in favor of white individuals. Plaintiff Howell alleges that an African American supervising manager gave a discriminatory performance evaluation and wrongfully eliminated her job.

the court held that it could not consider Sodexho's statistical evidence or Dr. Haworth's critique of Dr. Siskin's analysis, as that would constitute a battle of experts inappropriate for Rule 23 analysis. Instead, the only consideration was whether plaintiffs' statistical evidence satisfied the minimum requirements for ***admissibility***. *See* App. 38a, 208 F.R.D. at 443 (refusing to pass on the merits of plaintiffs' statistical evidence and instead considering only whether that evidence was "'so incomplete as to be inadmissible as irrelevant'") (quoting *Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d 283, 292 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000)). Because Dr. Siskin's report satisfied that minimal threshold, the court never addressed the fact that even his data and methodology showed that any statistically significant instances of discrimination were narrowly concentrated in tiny pockets of discrete geographical regions and divisions. In essence, the court permitted Sodexho to mount a bare-bones *Daubert*-type challenge to Dr. Siskin's opinion, but nothing more, making certification a foregone conclusion.

Not surprisingly, under this liberal standard, the court found plaintiffs' proffer sufficient to meet the commonality and typicality tests of Rule 23(a) and certified a class for liability purposes only.[5] Instead of conducting a rigorous analysis as required by *Falcon*, the court certified a nationwide class based upon the shakiest of foundations: (1) limited anecdotal evidence largely emanating from one of the 155 regions; (2) Dr. Siskin's finding of a "shortfall"

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5. Rather than address the overwhelming problems that it would face in assessing damages and determining back pay for such an enormous class, the court deferred any consideration of whether the class could satisfy the requirements of Rule 23(b)(2) or (b)(3) as to remedy. *See* App. 50a-52a, 208 F.R.D. at 448-49. Thus, the court never determined whether plaintiffs' claims as a whole satisfy Rule 23(b).

of some 250 promotions for African Americans out of 10,000 promotion decisions made in 1995-2001 (far beyond the 3-year limitations period) without controlling for geography, experience, education, or other critical factors; and (3) Sodexho's use of allegedly subjective criteria and decentralized processes for upper-level promotions.

It is no exaggeration to say that the district court's decision holds dire implications for challenges to the promotion record of any large national corporation. A nationwide class of 2,600 managerial employees was certified because plaintiffs' expert found that African American managers are underrepresented at higher pay scales when compared to white managers with comparable dates of hire. Until now, such allegations of glass-ceiling obstacles to upper-level management positions have never been held to permit a massive class action absent proof that the barriers to promotion emanate from discriminatory policies, rather than job-related selection decisions or other exogenous factors. And, until now, no nationwide class has been certified without proof that nationwide discrimination occurred.

Under the district court's analysis, evidence of purported minority under-representation in upper-level management positions anywhere in a national corporation may trigger class certification if it is not explained by seniority and if it is coupled with anecdotal evidence of discriminatory treatment and subjective promotion criteria. Plaintiffs need not demonstrate statistically significant labor market availability; account for education, prior experience, or other factors affecting promotion decisions; or produce evidence of corporate-wide discriminatory policies or practices.

Such a momentous decision warrants careful appellate consideration, and Sodexho therefore timely petitioned the D.C. Circuit for leave to pursue an interlocutory appeal pursuant to Rule 23(f). The petition raised several important and unsettled issues of law:

- Whether *Falcon* permits a district court to rely upon statistical analyses and anecdotal evidence that, for all practical purposes, the defendant is not allowed to challenge or rebut – even though, under *plaintiffs'* methodology, only a small percentage of regions showed statistically significant adverse results?

- Whether the existence of decentralized and subjective decision-making in deciding promotions for managerial and executive-level employees could constitute a nationwide discriminatory policy sufficient to satisfy the commonality requirement of Rule 23(a)(2)?

- Whether named plaintiffs are adequate class representatives if they (or other class members) allege discriminatory treatment by other class members?

- Whether a district court may certify a class for liability purposes only, without determining that the remedies sought by the class satisfy Rule 23(b)?

The D.C. Circuit denied this petition in a per curiam order stating that Sodexho had failed to demonstrate an unsettled fundamental issue of law that is likely to evade end-of-the-case review. App. 1a-2a. This standard, obviously, is nearly impossible to meet, requiring proof of a *likelihood* that Sodexho's certification challenge would evade end-of-

the-case review. Short of a sworn declaration that it cannot afford to take the case to trial given the risk of a crippling damage award – a grave concession to make in any settlement effort – it is difficult to see how Sodexho could ever satisfy this test. Indeed, in applying virtually the same standard as in the D.C. Circuit, the Second Circuit has stated candidly that it will only "rarely" grant 23(f) requests.

This Court has never addressed Rule 23(f). In light of the significance of the district court's ruling and the sharp division among the circuits as to the appropriate standards for appellate review under Rule 23(f), this case presents a compelling opportunity for the Court to resolve that conflict.

REASONS FOR GRANTING THE PETITION

Certification is often the case-defining event in a large class action case. *See, e.g., Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (certification "may induce a substantial settlement even if the [plaintiffs'] position is weak"); Civil Rules Advisory Comm., Minutes, Nov. 9-10, 1995 hearing, 1995 WL 870908, at *4 (J.C.U.S. 1995) ("[a] grant or denial of certification can 'make or break' the litigation"). That is especially the case here in light of the relief sought by the class – well over $1 billion arising from the purported wrongful denial of promotions among 2,600 class members. Where the stakes are so momentous, this Court should intervene and ensure that consistency among the circuits and basic common sense prevail as to the standards for interlocutory appeal of certification decisions.

A. The Conflict Among The Circuits Regarding The Standards For Granting Review Under Rule 23(f).

The D.C. Circuit's refusal to hear Sodexho's appeal is especially deserving of certiorari. Its standard for deciding whether to exercise its broad discretion to decide Rule 23(f) petitions for interlocutory appeal is virtually impossible to meet, at least as stringent as the mandamus and 28 U.S.C. § 1291 remedies that it was intended to supplant. Both the Third and Seventh Circuits have rejected the D.C. Circuit's restrictive tests.

This disparity among the Circuits was recognized by the D.C. Circuit decision that first announced the rule, *In re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102-04 (D.C. Cir. 2002). There, the D.C. Circuit considered but rejected more liberal standards in favor of a test limiting Rule 23(f) appeals to cases where the petition satisfies one of three grounds: (1) the certification decision constitutes a "death-knell" for a party such that the case will not proceed further and is "questionable" on the merits; (2) it presents an unsettled and fundamental question of law that is important both to the specific case and to class actions generally and is "likely to evade end-of-the-case review"; or (3) the decision is "manifestly erroneous." *Id.* at 105. The D.C. Circuit did not rule out other circumstances but made clear that Rule "23(f) review should be granted rarely where a case does not fall within one of these three categories." *Id.*

This standard is patently unfair and wholly unrealistic. Cases with "manifest error" are rare and, in any event, remediable by mandamus. Death-knell cases and certification decisions that are likely to evade end-of-the case review are

even more rare and extraordinary. Indeed, to prove that a certification decision is likely to evade end-of-the-case review, a defendant would have to prove that it cannot afford to face the potentially devastating impact of an adverse class-wide judgment and therefore will be forced to settle the case before trial. The mere assertion of such a claim would greatly prejudice the defendant: once it publicly announces its unwillingness to risk trial, the defendant would have to negotiate settlement from a vantage of absolute weakness, having already declared a losing hand. Essentially, the defendant who seeks interlocutory appeal must accept the price that, if the appeal fails, it will likely have to capitulate to the class's demands – a risk that few, if any, Rule 23(f) petitioners would ever accept.

In essence, the D.C. Circuit has established its own death-knell rule for Rule 23(f). As of this petition, the D.C. Circuit has yet to grant a Rule 23(f) petition. *See In re Allstate Ins. Co.*, No. 02-8010, 2002 WL 31545753, at *1 (D.C. Cir. Nov. 14, 2002) (per curiam); *In re Veneman*, 309 F.3d 789, 794-96 (D.C. Cir. 2002); *In re Bioproducts, Inc.*, No. 02-8006, 2002 WL 1997993, at *1 (D.C. Cir. Aug. 29, 2002) (per curiam); *In re Rand Corp.*, No. 02-8007, 2002 WL 1461810, at *1 (D.C. Cir. July 8, 2002) (per curiam); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d at 109 (all denying Rule 23(f) petitions).[6]

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6. Contrast with cases from the following jurisdictions, all of which granted Rule 23(f) review: *Smilow v. S.W. Bell Mob. Sys., Inc.*, 323 F.3d 32, 36-37 (1st Cir. 2003); *Beck v. Boeing Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 910 (7th Cir. 2003); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737 (7th Cir. 2003); *Sandwich Chef of Tex., Inc. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205, 218-19 (Cont'd)

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(5th Cir. 2003); *City of Hialeah, Fla. v. Rojas*, 311 F.3d 1096, 1100-01 (11th Cir. 2002); *Monahan v. City of Wilmington*, 49 Fed. Appx. 383, 384, 2002 WL 31341336, at *1 (3rd Cir. 2002); *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1259 (11th Cir. 2002); *Casas v. American Airlines, Inc.*, 304 F.3d 517, 520 (5th Cir. 2002); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 150 (3d Cir. 2002); *Coleman v. General Motors Accept. Corp.*, 296 F.3d 443, 446 (6th Cir. 2002); *Franze v. Equitable Assurance*, 296 F.3d 1250, 1251 (11th Cir. 2002); *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380, 382 (3d Cir. 2002); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 959 (8th Cir. 2002); *West v. Prudential Secs., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 318 (5th Cir. 2002); *Smith v. Texaco, Inc.*, 281 F.3d 477, 479 (5th Cir. 2002); *Cason v. Nissan Motor Accept. Corp.*, 28 Fed. Appx. 392, 393, 2002 WL 22351, at *1 (6th Cir. Jan. 7, 2002) (appeal granted, then vacated on unrelated grounds); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1345 (11th Cir. 2001); *In re Visa Check/ MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 (2d Cir. 2001); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 183 (3d Cir. 2001); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 478 (5th Cir. 2001); *Smilow v. S.W. Bell Mob. Sys., Inc.*, No. 01-8001, slip op. at 1-2 (1st Cir. July 12, 2001), *cited in Smilow*, 323 F.3d at 36; *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 141 (4th Cir. 2001); *Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001); *Culpepper v. Irwin Mortg. Corp.*, 253 F.3d 1324, 1326 (11th Cir.), *reh'g denied*, 273 F.3d 1118 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1236 n.7 (9th Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *Murray v. Auslander*, 244 F.3d 807, 810 (11th Cir. 2001); *Kirkland v. Midland Mortg. Co.*, 243 F.3d 1277, 1279 (11th Cir. 2001); *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 142 (3d Cir. 2001);

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This draconian impact should come as no surprise. With the exception of the "manifest error" prong, the D.C. Circuit standard was drawn from *In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001), which did not mince words as to its intent to shut the door on Rule 23(f) appeals: "We anticipate, therefore, that the[se] standards of Rule 23(f) will rarely be met."

That was never the intent of the authors of Rule 23(f).[7] Throughout the Advisory Committee's lengthy consideration of this provision, the authors repeatedly described its fundamental importance given the fact that class certification

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Turner v. Beneficial Corp., 242 F.3d 1023, 1024 (11th Cir.) (en banc) (referencing panel's grant of 23(f) petition), *cert. denied*, 534 U.S. 820 (2001); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 293 (5th Cir. 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 418 (5th Cir. 2001); *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1192 (9th Cir. 2000); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 973 (5th Cir. 2000); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1271 (11th Cir. 2000); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1231 (11th Cir. 2000); *Pickett v. Iowa Beef Proc'rs*, 209 F.3d 1276, 1279 (11th Cir. 2000); *Waste Mgmt. Hldgs., Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999); *West Pub. Co. v. Carter*, No. 98-90015-D, 1999 WL 996377, at *1 (11th Cir. June 30, 1999); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999).

7. Indeed, in a subsequent opinion, the Second Circuit allowed interlocutory appeal under Rule 23(f) to address "a legal question about which there is a compelling need for immediate resolution" without requiring petitioner to demonstrate that that issue was likely to evade end-of-the-case review. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 n.3 (2d Cir. 2001). Thus, the Second Circuit standard may in fact be significantly more liberal than the D.C. Circuit standard.

is often a case-defining or deciding event. *See, e.g.*, Civil Rules Advisory Comm., Minutes, April 28-29, 1994, 1994 WL 809916, at *10 (J.C.U.S. 1994) (comments of Herbert M. Wachtell, Esq., observing that provision for interlocutory appeal "is a desirable supplement to interlocutory appeal by certification of the district court and permission of the appellate court" because "[t]he decision on class certification is, at times, effectively the final decision in the action. Denial leaves the representatives unable to litigate the claim, while grant forces the defendant to settle").[8]

Indeed, the Advisory Committee defeated efforts to limit the breadth of the Rule. In response to public comment and testimony, the Committee removed statements in its Note that would have advised courts that the Rule was not intended to have broad effect: "Passages predicting that permission to appeal would be granted with restraint, and that the

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8. *Accord*, Civil Rules Advisory Comm., Minutes, Feb. 16-17, 1995, 1995 WL 870909, at *9 (J.C.U.S. 1995) ("Many participants believed that the opportunity for appeal, controlled in the discretion of the court of appeals, is highly desirable. The decision on class certification can have overwhelming importance. A defendant may feel forced to settle by certification, while a plaintiff may feel forced to abandon the claim by denial of certification."); *id.* at *17 (comments by Henry Thumann, Esq., describing 23(f) as a cure to "the *in terrorem* effect of an improvidently certified class"); *id.*, Minutes, Nov. 9-10, 1995, 1995 WL 870908, at *5 ("the draft is intended to make appeals more readily available" and "the major impetus for appeal will come in cases presenting unsettled issues of law"); *id.*, Minutes, May 1-2, 1997, 1997 WL 1056241, at *6 ("Appellate courts have strained to take a more active role in class-action law in recent years, with good results. Affording a more regular means of involvement, increasing the opportunities for appellate review, may do much to simplify current law and make practice more nearly uniform.").

proposed change is modest, were removed." Civil Rules Advisory Comm., Minutes, May 1-2, 1997, 1997 WL 1056241, at *7 (J.C.U.S. 1997). The final version of the Note thus charges that appeals presenting significant legal issues should be heard: "Permission is most likely to be granted when the certification decision turns on a novel or unsettled issue of law, ***or*** when, as a practical matter, the decision of certification is likely dispositive of the litigation." Fed. R. Civ. P. 23(f) Advisory Committee Note (emphasis added).

The D.C. Circuit rule cannot be reconciled with these principles. Even if the drafters intended courts of appeal to have broad, unfettered discretion akin to this Court's discretion to grant or deny writs of certiorari, *see id.*, they did not intend for those courts to use that discretion to limit review to the rarest of cases.

By contrast, standards adopted by the Third and Seventh Circuit comport with the drafters' intent, as they explicitly allow interlocutory appeals raising significant issues without requiring defendant prove that the issues are likely to evade end-of-the-case review. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (allowing Rule 23(f) review if the district court made "an erroneous ruling" or if the ruling would "facilitat[e] development of the law on class certification"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (granting interlocutory appeal because (a) the size of the proposed class put inordinate settlement pressure on the defendant, (b) the district court's decision was problematic, and (c) the 23(f) petition raised "important legal issues" that "have evaded attention by appellate courts"); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999) (permitting appeal where (a) denial of class certification

effectively ends the case; (b) grant of class certification raises stakes of litigation and places inexorable pressure on defendant to settle; and (c) appeal would clarify fundamental issue of law).[9]

Not only is there an irreconcilable conflict between the D.C. Circuit and the Third and Seventh Circuits, but there also is a conflict between the D.C. Circuit and the Eleventh and Fourth Circuits. Those circuits utilize a flexible "sliding scale" test that permits review of important unsettled legal issues without requiring proof that the issues will evade end-of-the-case review. *See Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1271-77 (11th Cir. 2000) and *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 142-46 (4th Cir. 2001).[10]

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9. The First Circuit has praised the Seventh Circuit's *Blair* opinion as "cogently reasoned" and agreed that it "captures the essential principles on which Rule 23(f) rests." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000). Nevertheless, to avoid a flood of interlocutory appeals and ensure that Rule 23(f) remains "the exception, not the rule," *id.*, *Mowbray* amended *Blair*'s third factor (fundamental issues of law) to emphasize that the issue must be "likely to escape effective review." *Id.* at 294. Thus, the First Circuit has adopted a highly restrictive standard closer to that of the D.C. Circuit, even though it professes affinity with the Seventh Circuit.

10. In *Prado-Steiman*, the Eleventh Circuit identified the following factors: (1) whether the district court's order is likely dispositive of the litigation by creating a "death knell" for either plaintiff or defendant; (2) whether petitioner has shown a substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion; (3) whether the appeal will permit resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself; (4) the nature and

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Unlike the D.C. Circuit, the Third and Seventh Circuits recognize that Rule 23(f) review is important because class actions usually settle and, as a result, key district court decisions have "not been subject to appellate consideration." *Szabo*, 249 F.3d at 676. Thus, those courts focus on whether an appeal presents significant legal issues, whereas the D.C. Circuit considers whether end-of-the-case review is likely. Not surprisingly, the Third, Seventh, and Eleventh Circuits have employed Rule 23(f) to address significant class certification issues.

B. Sodexho's Petition Satisfied The Third, Fourth, Seventh, And Eleventh Circuits' Standards For Rule 23(f) Review.

The *Newton*, *Szabo*, and *Blair* factors fit this case like Cinderella's glass slipper. There is little question that, under the Third or Seventh Circuit standards or the broad balancing test used in the Eleventh and Fourth Circuits, Rule 23(f) review would have been granted in this case.

The massive size of the certified class and plaintiffs' claims alone would justify 23(f) review in the Seventh and

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status of the litigation before the district court; and (5) the likelihood that future events may make immediate appellate review more or less appropriate. Since *Prado-Steiman*, the Eleventh Circuit has granted Rule 23(f) petitions eight times (eleven times overall) and denied appeal once. The Sixth Circuit also employs a balancing test but does not mandate specific factors. *See In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (denying review under balancing test that expressly "eschew[s] any hard-and-fast" bright-line rule and instead holds that "any pertinent factor may be weighed in the exercise of th[e court's] discretion" to allow or reject Rule 23(f) petitions).

Third Circuits. *See Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) ("all [circuits] agree that a compelling case for the exercise of our new discretion is one in which the grant of class status places undue pressure on the defendant to settle regardless of the actual merit of the suit"). As the Seventh Circuit stated in *Szabo*, a certification order that "turns a "$ 200,000 dispute (the amount Szabo claims as damages) into a $ 200 million dispute. . . . puts a bet-your-company decision to [defendant]" that may "induce a settlement even if the [plaintiffs'] position is weak." *Szabo*, 249 F.3d at 675. Indeed, the historical record shows just that. Since Title VII was amended over a decade ago to include compensatory and punitive damages, ***no*** private sector employment discrimination class action to Sodexho's knowledge has proceeded through a full trial of liability and damages. Interlocutory review under Rule 23(f) is the only meaningful recourse for most defendants in Sodexho's situation.

Sodexho's petition also raised fundamental, unsettled issues of class action law that readily satisfied the Third and Seventh Circuit's tests.

First, Sodexho raised an open question in the D.C. Circuit (and a direct conflict among other circuits) as to whether a district court's class certification analysis is limited to consideration of the plaintiffs' evidence or whether the court may consider rebuttal evidence offered by the defendant. Applying Second Circuit precedent, the district court held that it could not consider defendant's statistical evidence demonstrating the absence of class-wide discrimination, even where that evidence was interstitial in nature and not simply reflecting a disagreement of experts. The only material question was whether plaintiffs' statistical

evidence was sufficiently relevant to the claims to be admissible (*i.e.*, a minimal *Daubert* question). Under this standard, little more than a deferential Fed. R. Civ. P. 12(b)(6) analysis is needed for certification, and any artfully framed complaint supported by a colorable expert opinion will satisfy Fed. R. Civ. P. 23.

This issue clearly constituted an unsettled, fundamental issue of law regarding class certification. While a sharply divided (2-1) Second Circuit panel opinion in *Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d 283, 292 (2d Cir. 1999) supported the district court's opinion, both the Third and Seventh Circuits reject that approach. *See Newton*, 259 F.3d at 167 (concluding that court may make a preliminary inquiry into the merits and should decide certification "'only after consideration of all relevant evidence and arguments'"); *Szabo*, 249 F.3d at 675 (reversing district court decision that had "certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment"). Indeed, in *Szabo*, the Seventh Circuit expressly stated that the "proposition that a district court must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it[,]" 249 F.3d at 675, a position diametrically contrary to that of the district court and *Caridad*.[11]

11. Earlier decisions in at least two other circuits agree with the Third and Seventh Circuits. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (holding that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) does not bar inquiry beyond sufficiency of plaintiffs' allegations); *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 273-74 (4th Cir. 1980) (district court must delve into the circumstances of the case because at this stage "the class action and merit inquiries essentially coincide"). Some district courts

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Commentators have underscored the profound significance of this conflict among the circuits, especially for employment discrimination cases, and called for clarification. *See* Robert G. Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1270 (2002) (describing "a rather muddled body of case law" in which the "[c]ourts disagree about how closely they can examine evidence and scrutinize the factual merits at the certification stage"). As Bone and Evans explain, the practical impact of a holding that district courts lack authority to engage in a critical analysis of plaintiffs' expert opinion, notwithstanding *Falcon*'s admonition that courts must "rigorously" assess class claims, is to ensure certification. *Id.* at 1325-26 (effect "is to insulate almost any expert's statistical evidence from challenge at this certification stage and ***virtually guarantee plaintiffs' success*** in establishing certification requirements. . . . even when the evidence for company-wide discrimination is seriously flawed") (emphasis added). This case, where the district court essentially started and stopped with plaintiffs' allegations and adopted their tepid statistical analysis wholesale,[12] presents a paradigm vehicle to address this fundamental issue of law.

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have therefore freely considered defendants' statistical evidence and expert reports. *See, e.g., Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, __, 2003 WL 933152, at *52 (N.D. Ga. Mar. 7, 2003) (observing that where "statistical evidence established Rule 23 commonality and typicality elements[,]" the court "was obligated to conduct a careful review of the statistical evidence presented"); *Serafty v. Inter. Automated Sys., Inc.*, 180 F.R.D. 418, 421-22 (D. Utah 1998) (crediting defendant's expert statistical analysis as basis for rejecting certification).

12. As previously stated, Dr. Siskin's methodology was seriously flawed: (1) it did not account for important variables such

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Second, Sodexho challenged the district court's ruling that the existence of a decentralized and allegedly subjective system for managerial and executive level promotions may constitute a sufficient "policy" with discriminatory impact across the entire class. Here, too, the circuits are in conflict, and no clear D.C. Circuit precedent exists. Indeed, the district court itself recognized the lack of controlling precedent, *see* App. 35a, 208 F.R.D. at 442 ("there is really no case on point"), but it again essentially sided with *Caridad*, concluding that Dr. Siskin's finding of a shortfall in promotions for African Americans meant that Sodexho's subjective and decentralized process reflected a discriminatory policy.

As the district court recognized, the issue needs appellate scrutiny. A flurry of recent district court opinions have refused to certify classes in employment discrimination cases involving highly decentralized, geographically sprawling companies on commonality, typicality, or Rule 23(b)(3)

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as prior job experience or education, (2) it did not distinguish between seniority earned in managerial positions and non-managerial positions or in full-time and part-time positions, and (3) it did not analyze the results by division and region to determine whether a pattern of adverse treatment actually exists across Sodexho nationally. Just as troubling, the district court failed to analyze meaningfully Sodexho's evidence of a clear and fatal conflict of interest among class representatives and members, which, under D.C. Circuit precedent, *Wagner v. Taylor*, 836 F.2d 578, 595 (D.C. Cir. 1987), should have precluded certification. Those intra-class conflicts, a predictable consequence of certifying a class that includes all levels of management – from entry-level to division president – were not speculative and instead were well-documented by detailed testimony. The district court, however, sidestepped this defect by summarily dismissing that testimony as "confusing."

grounds.[13] By contrast, over a vigorous dissent, the divided

13. The district court elected not to follow numerous recent precedents to the contrary. *See, e.g., Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 670 (N.D. Ga. 2001) (use of decentralized, subjective hiring criteria for "broad, multi-facility class" defeats certification); *Cooper v. Southern Co.*, 205 F.R.D. 596, 626-27 (N.D. Ga. 2001) (in large, geographically sprawling company, individual managers' discretion did not constitute a "policy" of discrimination); *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 567 (W.D. Wa. 2001) ("[c]ourts have recognized that it is not possible to make a finding of commonality where the putative class involves extensive diversity in terms of geography, job requirements, and/or managerial responsibilities"); *Beck v. Boeing Co.*, 203 F.R.D. 459, 463-64 (W.D. Wa. 2001) ("if these statistics do not apply at each and every location covered by the putative class, commonality has not been established", *aff'd in part, rev'd in part on other grds.*, 60 Fed. Appx. 38, 2003 WL 683797 (9th Cir. Feb. 25, 2003); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 542 (N.D. Ala. 2001) (claims of individuals "who worked in a 542 multi-state geographical area, in different organizational divisions . . . , in separate facilities, at different times, reporting directly to and under the direct supervision of numerous autonomous decision-makers. . . . do not lend themselves to class treatment"); *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 432 (E.D. Wis. 2001) ("[h]ere, by contrast, the decisions of apparently hundreds of center managers are implicated, requiring many individualized inquiries that not only undermine 'commonality' but also have the potential to render class treatment unworkable"); *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 544-45 (D.N.J. 2001) ("policy of delegating discretionary employment decisions to local supervisors" is not ordinarily a basis for class certification "absent an allegation that the company intended to use this policy to discriminate"); *Miller v. Hygrade Food Prods. Corp.*, 198 F.R.D. 638, 642-44 (E.D. Pa. 2001) (individualized inquiries predominate where subjective standards were applied to "individuals employed in different divisions, under different supervisors, for varying durations of time"); *Lott v. Westinghouse Savannah Co. River*

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panel in *Caridad* reversed a district court decision that had reached a similar outcome. *See* 191 F.3d at 292; *compare with* 191 F.3d at 296 (Walker, J., dissenting) ("As a matter of law, I cannot agree . . . that [defendant's] practice of delegating personnel decisions – plaintiffs prefer to call it 'overdelegation' – constitutes a policy or practice sufficient to satisfy the commonality requirement").

The significance of this issue is compounded exponentially by the transparent flaws in plaintiffs' expert evidence. Many large corporations are vulnerable to

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Corp., 200 F.R.D. 539, 556 (D.S.C. 2000) ("[t]he diversity of employment conditions, coupled with the sheer absence of evidence proving [that] centralized decisionmaking for the types of decisions challenged in this suit compels the court to find a lack of commonality"); *Zachery v. Texaco Explor. & Prod., Inc.*, 185 F.R.D. 230, 239-40 (W.D. Tex. 1999) (refusing to certify multi-facility class working in 17 business units spread across 15 states, each with varying amounts of local autonomy over employment decisions); *Betts v. Sunstrand Corp.*, No. 97 C 50188, 1999 WL 436579, at *7 (N.D. Ill. 1999) ("[t]he lack of a centralized hiring decisionmaker, the sheer number of managers who hire applicants, and the wide range of jobs included in the prospective class, indicate the lack of a common nucleus of operative fact between class members"); *Abrams v. Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. 116, 130 (S.D. Tex. 1997) (commonality and typicality lacking because "the members of the purported class were not subjected to the same decision making authority"); *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 159 (D. Kan. 1996) (absence of centralized employment decisionmaking or a showing of decentralization by the defendant may result in denial of class certification). *See also Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980) (reversing certification of statewide class where district court had failed "to appreciate the significance of the dispersion of . . . class members throughout a great number of geographically separated facilities").

a potentially devastating class action if subjective, decentralized decision-making for management level positions may be deemed a discriminatory "pattern or practice" merely because of a shortfall in promotions for African American managers to upper level managerial positions when measured by the date of their hire but not measured by potential differences in region, job status, education, prior experience, part-time experience or other obvious candidates that could account for the disparity. At least in *Caridad*, the plaintiffs' expert "controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion." 191 F.3d at 293.

Finally, Sodexho petitioned the D.C. Circuit to consider another important, fundamental issue of law: whether the district court properly certified a class only for liability purposes without determining that the remedies sought by the class satisfy Rule 23(b). The district court acknowledged that at least one of plaintiffs' claims (a continuing violation theory) might preclude certification under Rule 23(b) for a remedy, *see* App. 40a n.27, 208 F.R.D. at 444 n.27, thus raising a clear possibility that plaintiffs' claims ultimately might not satisfy Rule 23(b). Again, the circuits have split on whether a district court may use a partial certification mechanism to avoid Rule 23(b). *Compare Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.") *with Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167-69 (2d Cir. 2001) (allowing district court's partial certification).

Each of these issues warranted appellate review in its own right. Collectively, they presented a compelling set of important issues lying at the intersection of Rule 23 and massive employment discrimination actions. They easily parallel the issues raised in the numerous appeals that other circuits have allowed under Rule 23(f).

The unfairness of de minimis review under Rule 23(f) has not escaped Congressional attention. *See* Civil Rules Advisory Comm., Minutes, May 1-2, 1997, 1997 WL 1056241, at *6. Last year, the House of Representatives passed a bill, H.R. 2341, mandating an automatic right to interlocutory appeal of all certification decisions under Rule 23, and a similar bill has been introduced this year. Unfortunately for Sodexho and the many others in its predicament, even if it were to become law as currently drafted, the bill might not apply to currently pending cases. Nevertheless, the fact that the House would be so struck by the unfairness of the lack of an opportunity for interlocutory appeal that it would take steps to supersede Rule 23(f) speaks volumes to the degree to which the D.C. Circuit has strayed from the original intent of the Rule.

The interlocutory nature of Rule 23(f) makes certiorari imperative. By definition, if the conflict among the circuits regarding Rule 23(f) is ever to be reviewed by this Court, it must be done following the denial of leave to pursue an interlocutory appeal, as here. Given the magnitude of the class certified by the district court, the existence of numerous unsettled and important issues of law, and the overwhelming impact of the certification decision on the course of the case, the issue presented herein is uniquely situated for review by this Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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